THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

THEODORE GLADYSZ,

Plaintiff,

v. **Civil Action No. 3:08-CV-64**
(Judge Bailey)

GEORGE TRENT, et. al,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The above-styled case is presently before the Court on defendants' Motion for Summary Judgment [Doc. 80], filed on September 20, 2010; defendants' Reply [Doc. 82], filed on October 18, 2010; plaintiff's untimely Response [Doc. 83]; and defendants' Reply to Plaintiff's Untimely Response [Doc. 84], filed on November 2, 2010. The Court has reviewed the record and the arguments of the parties and finds that defendants' Motion for Summary Judgment [Doc. 80] should be **GRANTED**.

I. BACKGROUND AND PROCEDURAL HISTORY

The plaintiff is an inmate in the custody of the United States Bureau of Prisons. It is believed that he is currently serving his sentence at the Butner Federal Correctional Institution located in Butner, North Carolina. Previously, however, the plaintiff was housed at the North Central Regional Jail.

Here, plaintiff is asserting two separate cruel and unusual punishment claims. The first claim is a result of an April 1, 2007 incident where the plaintiff was disruptive and throwing soap. After the plaintiff refused to follow officer commands, one burst of Aerosol

O.C. Spray was delivered to the plaintiff's facial area. Thereafter, plaintiff was escorted outside to the recreation yard for the decontamination process. Plaintiff is alleging that the use of force on April 1, 2007 was in violation of the Eighth Amendment cruel and unusual punishment clause. *See* ***Farmer v. Brennan***, 511 U.S. 825 (1994). It is only "the unnecessary and wanton infliction of pain" that constitutes cruel and unusual punishment which is prohibited by the Eighth Amendment. ***Whitley v. Albers***, 475 U.S. 312, 320 (1986).

The plaintiff's second complaint is that officers failed to provide him with leg and knee braces that were medically necessary. Plaintiff also asserts that jail administrator George Trent threatened him upon his complaining about his treatment in the cell and yard.

II. UNDISPUTED MATERIAL FACTS

1. On April 1, 2007, bars of soap were thrown from plaintiff's cell at correctional officers at the North Central Regional Jail. (Request for Admissions[1] ("Admissions")[Doc. 81-1) ¶ 1; McClain Aff. [Doc. 81-12] ¶ 2-3; Trent Aff. [Doc. 81-17] ¶ 4).

2. In order to control the situation, Correctional Officers Jacoby, McClain, and Gaskins responded to the plaintiff's cell. (Jacoby Aff. [Doc. 81-2] ¶ 1; Gaskins Aff. [Doc. 81-3] ¶ 2; McClain Aff. [Doc. 81-12] ¶ 2-3).

3. During investigation of the incident, both the plaintiff, Theodore Gladysz, and his cell mate, inmate Edward Gross, defied officers' orders and struggled. (Admissions [Doc. 81-1] ¶ 19-20; Jacoby Aff. [Doc. 81-2] ¶ 1; Gaskins Aff. [Doc. 81-3] ¶ 4; McClain Aff. [Doc. 81-12] ¶ 3; Trent Aff. [Doc. 81-17] ¶ 4; McClain Supplement [Doc.

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[1] On February 24, 2010, the Court deemed the Request for Admissions admitted. [Doc. 73]. At no time was that Order challenged or set aside.

84-1]; Knight Statement [Doc. 84-2, 84-3]).

4. Plaintiff refused to follow Officer Gaskins' commands to lay on the floor and place his hands behind his back. (Admissions [Doc. 81-1] ¶ 19-20; Jacoby Aff. [Doc. 81-2] ¶ 1; McClain Aff. [Doc. 81-12] ¶ 3; Trent Aff. [Doc. 81-17] ¶ 4; McClain Supplement [Doc. 84-1]; Knight Statement [Doc. 84-2, 84-3]).

5. In an effort to stop the struggle and control the situation, Officer Rick McClain utilized one burst of Aerosol O.C. Spray to the facial area of the plaintiff. (Jacoby Aff. [Doc. 81-2] ¶ 5; Gaskins Aff. [Doc. 81-3] ¶ 5; McClain Aff. [Doc. 81-12] ¶ 3; Trent Aff. [Doc. 81-17] ¶ 4; McClain Supplement [Doc. 84-1]; Knight Statement [Doc. 84-2, 84-3]).

6. After the spray was administered, inmate Gladysz became compliant. (McClain Aff. [Doc. 81-12] ¶ 3; Trent Aff. [Doc. 81-17] ¶ 4).

7. Thereafter, Gladysz was escorted to an outside recreation yard to begin the decontamination process. (Admissions [Doc. 81-1] ¶ 15; Jacoby Aff. [Doc. 81-2] ¶ 5; Gaskins Aff. [Doc. 81-3] ¶ 5; Incident Report [Doc. 81-5]; McClain Aff. [Doc. 81-12] ¶ 3; Trent Aff. [Doc. 81-17] ¶ 4).

8. He was taken to this area as it was the closest place to begin the decontamination process. (Jacoby Aff. [Doc. 81-2] ¶ 5; McClain Aff. [Doc. 81-12] ¶ 3).

9. In the yard, he was provided with fresh air and his face was misted with water. (Admissions [Doc. 81-1] ¶ 6, 15; Jacoby Aff. [Doc. 81-2] ¶ 5; Gaskins Aff. [Doc. 81-3] ¶ 5; McClain Aff. [Doc. 81-12] ¶ 3; Trent Aff. [Doc. 81-17] ¶ 4).

10. Plaintiff was walked around the yard with correctional officers in order to minimize the affects of the previously administered O.C. spray. (Admissions [Doc. 81-1] ¶ 15;

Jacoby Aff. [Doc. 81-2] ¶ 5; Gaskins Aff. [Doc. 81-3] ¶ 5).

11. Thereafter, he was taken to an area where he was provided with a shower and clean clothing. (Admissions [Doc. 81-1] ¶ 4; Gaskins Aff. [Doc. 81-3] ¶ 6; Incident Report [Doc. 81-5]; McClain Aff. [Doc. 81-12] ¶ 3-4; Trent Aff. [Doc. 81-17] ¶ 4).

12. Following the incident plaintiff was evaluated by Nurse Rachel Glascock. (Admissions [Doc. 81-1] ¶ 2; Jacoby Aff. [Doc. 81-2] ¶ 7; Gaskins Aff. [Doc. 81-3] ¶ 8; McClain Aff. [Doc. 81-12] ¶ 4; Trent Aff. [Doc. 81-17] ¶ 4).

13. Following the incident plaintiff was placed in the medical section of the facility. (Admissions [Doc. 81-1] ¶ 3; Offender Watch Log [Doc. 81-4]; Trent Aff. [Doc. 81-17] ¶ 4).

14. No staff member of the Northern Regional Jail impeded plaintiff's ability to seek medical treatment at the facility. (Admissions [Doc. 81-1] ¶ 8; Jacoby Aff. [Doc. 81-2] ¶ 7; McClain Aff. [Doc. 81-12] ¶ 4).

15. Plaintiff suffered no broken bones as a result of the April 1, 2007 incident. (Admissions [Doc. 81-1] ¶ 9; Jacoby Aff. [Doc. 81-2] ¶ 11; Gaskins Aff. [Doc. 81-3] ¶ 8; Incident Report [Doc. 81-5]).

16. Prior to April 1, 2007, plaintiff complained of left middle finger pain. (Admissions [Doc. 81-1] ¶ 10; Inmate Sick Call Slip [Doc. 81-10]; Mobile Diagnostics Services Report [Doc. 81-11]).

17. Prior to April 1, 2007, plaintiff complained of right ring finger pain. (Incident Report [Doc. 81-5] at 3/27/07; Mobile Diagnostics Services Report [Doc. 81-11]).

18. Prior to April 1, 2007, plaintiff complained of left shoulder pain. (Admissions [Doc. 81-1] ¶ 11; Incident Report [Doc. 81-5] at 3/27/07).

19. Prior to April 1, 2007, plaintiff complained of knee pain. (Admissions [Doc. 81-1] ¶ 12; University Health Progress Notes [Doc. 81-14]; Second University Health Progress Notes [Doc. 81-15]).

20. Plaintiff asserts that he was not provided his knee braces and special shoes in the jail facility. (*See* Inmate Request [Doc. 81-16])

21. Plaintiff asserts these items were denied him by Officer McCray and the denial constituted cruel and unusual conduct in violation of the Eighth Amendment. (*See* Inmate Request [Doc. 81-16]).

22. While incarcerated at the Northern Regional Jail a medical doctor did not prescribe plaintiff leg and/or knee braces. (Admissions [Doc. 81-1] ¶ 13; McCray Aff. [Doc. 81-13] ¶ 2, 7; University Health Progress Notes [Doc. 81-14]; Second University Health Progress Notes [Doc. 81-15]; Inmate Request [Doc. 81-16]).

23. Plaintiff was informed that he could purchase tennis shoes from the commissary. (Admissions [Doc. 81-1] ¶ 5; McCray Aff. [Doc. 81-13] ¶ 2; Inmate Request [Doc. 81-16]).

24. Plaintiff is able to walk without knee braces. (Admissions [Doc. 81-1] ¶ 16; McCray Aff. [Doc. 81-13] ¶ 6; Trent Aff. [Doc. 81-17] ¶ 5).

25. Plaintiff is able to walk without special shoes. (Admissions [Doc. 81-1] ¶ 17; McCray Aff. [Doc. 81-13] ¶ 6; Trent Aff. [Doc. 81-17] ¶ 5).

26. Plaintiff has not sought emotional or psychological treatment related to the April 1, 2007 allegations. (Admissions [Doc. 81-1] ¶ 18).

27. Plaintiff also asserts that jail administrator George Trent threatened him upon his complaining about his treatment in the cell and yard.

28. George Trent states that he never threatened plaintiff, but told him to do "what he thought was right". (Trent Aff. [Doc. 81-17] ¶ 2).

III. DISCUSSION

A. Standard of Review

The moving party is entitled to summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). *See* ***Charbonnages de France v. Smith***, 597 F.2d 406, 414 (4th Cir. 1979). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986).

In considering a motion for summary judgment, the court is required to draw all reasonable inferences in favor of the nonmoving party and to view the facts in the light most favorable to the nonmoving party. ***Anderson***, 477 U.S. at 255. The moving party has the burden to show an absence of evidence to support the nonmoving party's case. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 325 (1986). The party opposing summary judgment must then demonstrate that a triable issue of fact exists; he may not rest upon mere allegations or denials. ***Anderson***, 477 U.S. at 248. A mere scintilla of evidence supporting the case is insufficient. ***Id.*** at 252.

"At the summary judgment stage, the Judge's function is not himself to weigh the evidence and determine whether there is a genuine issue for trial." ***Anderson***, 477 U.S. at 247. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported Motion for Summary Judgment." ***Id.***

"Sufficiency of evidence to create an issue of fact for the jury is solely a question of law". ***Houston v. Reich***, 932 F.2d 883 (l0th Cir. 1991). The Court does not have to accept unwarranted inferences, or unreasonable conclusions or arguments as true factual allegations. ***Eastern Shore Markets, Inc. v. JD Associates LTD***, 213 F.3d 175 (4th Cir. 2000) (citing 5a Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed. 1990 and Supp. 1998)).

B. The April 1, 2007 Incident

With regard to the April 1, 2007 incident, plaintiff alleges that officer McClain's shot of O.C. spray to plaintiff's face and the subsequent 'decontamination process' which took place in the yard constituted a use of excessive force, and cruel and unusual punishment. ([Doc. 83] at 1). Based on plaintiff's claims, the core judicial inquiry is "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *See* ***Wilkins v. Gaddy***, — U.S. —, 130 S. Ct. 1175, 1178 (February 22, 2010). Here, plaintiff made the use of force necessary; the force applied was appropriate; and the officer's actions after the use of the O.C. spray were appropriate. Accordingly, the Court finds for the reasons stated below that plaintiff's excessive force claim fails as a matter of law. *See* ***Hudson v. McMillian***, 503 U.S. 1, 4 (1992).

In their briefs, both parties address the nature of the plaintiff's injuries and whether or not they constitute *de minimus* injures. The governing case with regard to claims of excessive force is ***Wilkins***, 130 S. Ct. at 1178. The Supreme Court in ***Wilkins*** stated:

> In giving decisive weight to the purportedly *de minimis* nature of Wilkins' injuries, the District Court relied on two Fourth Circuit cases. *See* ***Riley***, 115 F.3d, at 1166-1168; ***Taylor***, 155 F.3d, at 483-485. Those cases, in turn, were based upon the

> Fourth Circuit's earlier decision in ***Norman v. Taylor***, 25 F.3d 1259 (1994) (*en banc*), which approved the practice of using injury as a proxy for force. According to the Fourth Circuit, ***Hudson*** "does not foreclose and indeed is consistent with [the] view ... that, absent the most extraordinary circumstances, a plaintiff cannot prevail on an Eighth Amendment excessive force claim if his injuries are *de minimis*." 25 F.3d at 1263.
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> The Fourth Circuit's strained reading of ***Hudson*** is not defensible. This Court's decision did not, as the Fourth Circuit would have it, merely serve to lower the injury threshold for excessive force claims from "significant" to "non-*de minimis*"– whatever those ill-defined terms might mean. Instead, the Court aimed to shift the "core judicial inquiry" from the *extent of the injury* to the *nature of the force*--specifically, whether it was nontrivial and "was applied ... maliciously and sadistically to cause harm." 503 U.S. at 7, 112 S.Ct. 995. To conclude, as the District Court did here, that the absence of "some arbitrary quantity of injury" requires automatic dismissal of an excessive force claim improperly bypasses this core inquiry. ***Id.*** at 9, 112 S.Ct. 995.

Wilkins, 130 S. Ct. at 1178 (emphasis added).

Thus, this Court must consider plaintiff's excessive force claims in light of the "nature of the force–specifically, whether it was nontrivial and 'was applied... maliciously and sadistically to cause harm.'" ***Id.*** As noted by one court,

> [a]lthough a plaintiff is no longer required to show that the injury suffered was more than *de minimis*, the seriousness of the injury is not irrelevant. [***Wilkins***, 130 S.Ct. at 1178]. The [Supreme Court in ***Wilkins***] reiterated that "[t]he extent of injury suffered by an inmate is one factor that may suggest 'whether

> the use of force could plausibly have been thought necessary' in a particular situation." ***Id.*** at 1178 (quoting ***Hudson***, 503 U.S. at 7). The Court also suggested that the seriousness of the injury could indicate the amount of force applied and stated that "[a]n inmate who complains of a 'push or shove' that causes no discernible injury almost certainly fails to state a valid excessive force claim." ***Id.*** (quoting ***Hudson***, 503 U.S. at 9).

Owens v. Harrison, 2010 WL 2680339, *2-*3 (E.D.N.C. July 6, 2010).

When dealing with a prison disturbance, a Court must determine whether unnecessary and wanton pain and suffering was inflicted which "ultimately turns on whether force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." ***Whitley v. Albers***, 475 U.S. 312, 321-22 (1986); ***Wilkins***, 130 S. Ct. 1175 (2010). In determining whether the defendant acted maliciously and sadistically, the following factors should be balanced: "(1) the need for application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of the injury; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of the forcible response." ***Id.*** at 321. *See also* ***Williams v. Benjamin***, 77 F.3d 756, 762 (4th Cir.1996).

Further, as here the Court is addressing a claim related to Aerosol O.C. Spray, the Court should consider the extra guidance provided by the Fourth Circuit with regard to these claims. *See* ***Williams***, 77 F.3d 756. The additional considerations set out in ***Williams*** inform the second and fourth prongs of the ***Whitley*** test, as "it is generally recognized that 'it is a violation of the Eighth Amendment for prison officials to use mace, tear gas or other chemical agents in quantities greater than necessary for the sole purpose of infliction of pain.' " ***Williams***, 77 F.3d at 763 (quoting ***Soto v. Dickey***, 744 F.2d 1260, 1270 (7th Cir.1984)). Accordingly, the Fourth Circuit has closely scrutinized the use of tear gas or mace in correctional facilities. The Fourth Circuit has held that:

> mace can constitutionally used in small quantities to prevent riots and escapes, or to control a recalcitrant inmate.... A limited application of mace may be much more humane and effective than a flesh to flesh confrontation with an inmate. Moreover, prompt washing of the maced area of the body will usually provide immediate relief from pain.

Williams, 77 F.3d at 763 (quotations and citations omitted). However, "it is necessary to examine the totality of the circumstances, including provocation, the amount of gas used, and the purpose for which the gas is used to determine the validity of the use of tear gas in the prison environment," as "even when properly used, such weapons 'possess inherently dangerous characteristics capable of causing serious and perhaps irreparable injury to the victim.' " ***Id.*** (quoting ***Slackan v. Porter***, 737 F.2d 368, 372 (4th Cir.1984)).

1. The Need for Application of Force and the Threat Reasonably Perceived by the Officers

First, the Court would note that plaintiff made the use of force necessary. Plaintiff and his cell mate started the events by throwing soap at officers. (Undisputed Material Fact "UMF" 1-2). Then, plaintiff resisted the officers' efforts to move him from his cell. (UMF3-5). Finally, in an effort to subdue plaintiff and regain control of the situation, Officer Rick McClain administered one burst of Aerosol O.C. Spray to the facial area of plaintiff. (UMF 5). *See* ***Brown v. Walker***, 2010 WL 4484185 *1, *4 (D.S.C. October 6, 2010) (finding need for application of force in the form of mace or pepper spray where prisoner was engaged in a verbal confrontation with the officer at the time he was sprayed, and noting "because prison officials are entitled to use appropriate force to quell prison disturbances, and because these officials oftentimes must act under pressure without the luxury of a second chance, in order for a prisoner to prevail on an Eighth Amendment claim he must demonstrate that officials applied force maliciously and sadistically for the very purpose of causing harm").

Additionally, here, plaintiff struggled with officers and failed to comply with their verbal commands. The officers sought to control the situation where both the plaintiff and his cell-mate were struggling. It is reasonable to find that the officers perceived a real threat to their own safety and to the order of the facility. *See* ***Morrison v. Jordan***, 2010 WL 3783452 (W.D.Va. September 28, 2010) (finding, "using physical force was necessary in this matter, and the officers reasonably perceived a threatening situation to enter a very small cell with an inmate who disregarded all orders to cuff-up and challenged the officers to come into the cell"); ***Peoples v. Vonmutius***, 2010 WL 3782038 (D.S.C. September 21, 2010) (finding reasonable force used in response to threat where officers used O.C. gas on plaintiff who was struggling, in order to be able to remove him from his cell).

2. The Relationship Between the Need and the Amount of Force that was Used

Second, the Court finds based on the undisputed material facts that the officers perceived a threat and responded with only the amount of force necessary to bring the situation under control. (*See* UMF 2, 4-6; Affidavits of Officers [Docs. 81-2, 81-3, 81-12, 81-13]). Plaintiff was struggling and refused to obey the officers' commands. (UMF 3-4). The officers sought to subdue him and when they could not get him under control, Officer McClain used the O.C. spray to subdue plaintiff. (UMF 5).

Given plaintiff's actions and the struggle that ensued in the cell, the force used was reasonable. *See* ***Graves v. Iseminger***, 2010 WL 4294321 *1, *2 (D.Md. October 28, 2010) (finding that there was reasonable force used when officers forcibly took prisoner to the ground and used pepper spray to subdue him after he refused to obey verbal commands and began struggling with one officer); ***Plummer v. Goodwin***, 010 WL 419927 *1, * 7 n. 4 (D.S.C. Jan.29, 2010) (finding that two bursts, totaling 33.50 grams of chemical munitions, used on plaintiff was "a relatively small quantity and not constitutionally relevant."); ***Townsend v. Anthony***, 2006 WL 2076920 *1, * 9 (D.S.C. July 24, 2006) (finding 20 grams to be a small amount).

3. The Extent of the Injury

Third, as noted above, the extent of the injury is one indication of the amount of force applied, and is a factor for the Court to consider in excessive force claims. ***Wilkins***, 130 S. Ct. at 1175. The Eighth Amendment prohibits "the unnecessary and wanton infliction of pain" which constitutes cruel and unusual punishment. ***Whitley***, 475 U.S. at 312. The extent of injury received by an inmate is one factor that may support whether the use of force could plausibly have been thought necessary in a particular situation. ***Whitley***, 475 U.S. at 312. "The extent of injury may also provide some indication of the amount of force applied." ***Wilkins***, 130 S. Ct. at 1175.

Here, plaintiff was throwing objects at officers from his cell, and the plaintiff struggled with officers and refused to comply with their commands. (UMF 1-5). In asserting control over the incident, the officers removed the plaintiff from his cell and used one short burst of Aerosol O.C. Spray to gain control of the struggling plaintiff. (UMF 5). However, despite the plaintiff's actions, his injuries were at most, *de minimis*. All plaintiff's injuries are consistent with gaining control of an unruly inmate.

The plaintiff asserts that his father did not recognize him as he was bruised and battered from the assault. Nurse Glascock, however, did not see any injuries that needed medical treatment on or about the plaintiffs person. ([Doc. 81-5]). Specifically, she stated: "Mr. Gladysz did not appear to be in distress or in need of medical treatment. I observed a superficial laceration about two inches in length on the left side of Mr. Gladysz's neck. I did not observe any bruises, black eyes. [sic] facial lacerations or any signs of redness, bruising or irritation to the plaintiff's head, neck or body." ([Doc. 84-7] ¶ 3). She further stated: "Upon my evaluation of Theodore Gladysz, I did not note that Mr. Gladysz appeared to need first aid or further medical treatment." ([Doc. 84-7] ¶ 4).

Here, plaintiff must show that the officers applied force "maliciously and sadistically for the very purpose of causing harm." ***Whitley***, 475 U.S. at 321-22. Plaintiff has, however, "brought forth no record evidence that, even viewed in the light most favorable to him, would meet his burden." ***Wilson v. Williams***, 1992 WL 297385 *1, *2 (N.D. Ill. Oct. 8, 1992). In ***Wilson***, the Court found that plaintiff failed to meet his burden under the summary judgment standard where he complained that an officer had struck him in the face but where "[u]pon examination [on the day of the attack], he exhibited no redness, swelling, bumps, bruises or abrasions on his left cheek or elsewhere on his face and neck." ***Id.*** Specifically, the Court stated the prisoner: "has adduced no evidence from which a fact finder could reasonably find that an assault even occurred, let alone that [the officer] acted with the requisite malice." ***Id.*** *See also* ***Holleman v. McKee***, 2006 WL 3447729 *1, *6 (S.D. Tex. Nov. 27, 2006) (finding summary judgment in favor of defendants appropriate where plaintiff alleged "...laceration on his left shin, contusions to the head and face, scratches, swelling above his eyes, and bruises on his arms...” but where the medical records from the medical department immediately following the use of force established that the only injury to plaintiff was a “2-3 centimeter U-shaped laceration on his left shin. [And] [n]o other cuts, bruises or contusions were noted at that time.”) Likewise, here, plaintiff has produced no evidence that he suffered any more than a “superficial laceration about two inches in length on the left side of [his] neck.” A superficial laceration to plaintiff’s neck is not sufficiently serious under an Eighth Amendment analysis.

Plaintiff complains that he suffered an injury and shoulder pain from the incident on April 1, 2007. Only days prior to the incident, on March 28, 2007, however, plaintiff was in an altercation with another inmate and complained of shoulder pain. [Doc. 81-6]. An x-ray of the shoulder was taken on April 2, 2007, after both the altercation with the other inmate and the subject incident. The x-ray revealed no fracture or dislocation. [Doc. 81-8]. Additionally, on May 21, 2007, the plaintiff had a physical performed by the Federal Medical Center for the Federal Bureau of Prisons. The plaintiff’s pain scale was 0. (*See* Inmate Screening Form [Doc. 81-9]).

Even if the plaintiff could somehow prove a shoulder injury, a shoulder injury is not considered a serious medical condition to amount to an Eighth Amendment violation. *See* ***Webb v. Prison Health Services***, 1997 WL 298403 (D. Kansas 1997). However, in this case, the plaintiff did not receive a shoulder injury as a result of the subject incident.

The plaintiff also has asserted that he suffered a middle finger deformity as a result of the incident. Following the incident, an x-ray of the middle finger was performed on April 12, 2007. No fracture or dislocation was observed. In fact, the x-ray revealed only degenerative changes. ([Doc. 81-14]). As a result, even if there was a finger injury caused by the incident, such an injury is not sufficiently serious under an Eighth Amendment analysis.

Further, even if the plaintiff suffered a finger injury during the incident, it is unlikely that a fractured finger would be considered a severe injury for an Eighth Amendment violation. Courts have found that a foot condition involving a fracture, a bone cyst and degenerative arthritis is not sufficiently serious for an Eighth Amendment violation. *See* ***Veloz v. New York***, 35 F. Supp. 2d 305, 312 (S.D.N.Y. 1999).

Additional evidence that the plaintiff did not suffer a sufficiently serious injury is that the plaintiff was evaluated by a nurse following the incident. (UMF 12). It is also admitted that the plaintiff did not receive any ongoing treatment for the injuries he allegedly sustained in the subject incident of April 1, 2007. Based on the foregoing, the Court finds that the extent of the injury factor weighs against a finding of excessive force.

4. Efforts Made to Temper the Severity of the Forcible Response

Here, plaintiff claims he was subjected to torment in the yard, forced to walk around for 45 minutes and only given one drop of water for each lap he completed. Plaintiff has failed to substantiate his claims that the officers forced him to walk laps around the yard and failed to provide him with water, a shower, or clean clothes. (UMF7-11). Summary Judgment is proper where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." ***Matsushita Electric Indust. Co. v. Zenith Radio Corp.***, 475 U.S. 574, 586 (1986). Plaintiff has not indicated that there are any correctional officers, other staff members, or witnesses to the alleged torment of plaintiff in the yard. In fact, there is much evidence–including plaintiff's own admissions–to the contrary. (UMF 7-11); (See Affidavits of Officers [Docs. 81-2, 81-3, 81-12, 81-13]).

The only evidence before the Court–aside from plaintiff's unsupported allegations in his Complaint–is that the officers took plaintiff to the nearest place for decontamination, misted plaintiff's face with water, and had plaintiff walk around the yard so as to help minimize the effects of the O.C. Spray. (UMF 7-11). Then, the officers provided plaintiff with a shower and clean clothes, and took him to be medically examined by Nurse Glascok. (UMF 11-12, 14). As such, this Court finds that the efforts made by the officers to temper the use of force in this case were appropriate and that the final factor also weighs against a finding of excessive force.

Thus, after a review of the record, the law, and the arguments of the parties, this Court is satisfied that the force used by defendants was not maliciously or sadistically applied to cause harm, but was applied in a good faith effort to maintain or restore discipline. *See* ***Wilkins***, 130 S. Ct. 1175.

C. Plaintiff's Claim for Leg and Knee Braces

Plaintiff's second claim is that he was unconstitutionally denied medically necessary leg and knee braces. To state a claim under the Eighth Amendment as cruel and unusual punishment for ineffective medical assistance, plaintiff must show that the defendant acted with deliberate indifference to his serious medical needs. ***Estelle v. Gamble***, 429 U.S. 97, 104 (1976). To succeed on an Eighth Amendment cruel and unusual punishment claim and to show deliberate indifference, an inmate must prove (1) that objectively, the "deprivation of a basic human need was... sufficiently serious" and (2) "that subjectively the prison official acted with a sufficiently culpable state of mind." ***Strickler v. Waters***, 989 F.2d 1375, 1379 (4th Cir. 1993) (internal quotations omitted), *see also* ***Wilson v. Seiter***, 501 U.S. 294 (1991).

In this case, the plaintiff cannot prove either element. Denial of the plaintiff's knee braces and special shoes does not amount to a sufficiently serious deprivation of a basic human need. Further, there is simply no evidence in the record to show that any of the defendants, including Officer McCray, had a sufficiently culpable state of mind. "[A] prison official cannot be found liable under the Eighth Amendment for denying inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the fact from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference." ***Farmer***, 511 U.S. at 837.

1. Objectively, the Deprivation of a Basic Human Need Was Not Sufficiently Serious

In this case, objectively, Officer McCray's denial of plaintiff's leg braces was a not a deprivation of a sufficiently serious basic human need. (UMF 22; McCray Aff. [Doc. 81-13]). The officer witnessed the plaintiff walk without the braces. (UMF 24-25; McCray Aff. [Doc. 81-13]). The officer had no information from any medical doctor that the plaintiff was in imminent need of the braces. (UMF 22; McCray Aff. [Doc. 81-13]).

A serious medical condition is one that has been diagnosed by a physician as mandating treatment or one that was so obvious that even a lay person would recognize the need for a doctor's attention. ***Gaudreault v. Municipality of Salem, Mass.***, 923 F.2d 203, 208 (4th Cir. 1990), *cert denied,* 500 U.S. 956 (1991). In this case, there is simply no such evidence. The plaintiff had the ability to walk without the braces. (UMF 24-25). In fact, these braces were not medically necessary but requested by the plaintiff prior to his incarceration. (*See* University Health Associates Progress Note dated January 24, 2006, [Doc. 81-14]). In the January 24, 2006 note, the doctor charted under Assessment/Plan "I wrote a prescription for some knee braces that he requested today."

Additionally, despite the *request* for these medical braces, the prescription was not filled for many months. At his visit of October 24, 2006, the doctor noted "he finally got his bilateral knee braces that we have written scripts for ... ". (*See* University Health, Associates Progress Note dated October 24, 2006, [Doc. 81-15]). This is evidence that plaintiff was not suffering any medical condition mandating treatment so obvious that even a lay person would recognize the need for a doctor's attention.

A medical condition is serious if the delay in treatment causes a life long handicap or permanent loss. ***Monmouth County COlT. Inst. Inmates v. Lanzaro***, 834 F.2d 326 (3d Cir. 1987), *cert. denied* 486 U.S. 1006 (1988). In this case, certainly any delay by the correctional officers in providing the braces did not amount to a life long handicap or permanent loss when prior to his incarceration, the filling of plaintiff's prescription for the requested braces was delayed for roughly 10 months. (*See* University Health, Associates Progress Note dated October 24, 2006, [Doc. 81-15]); *see also* ***Thompson v. California***, 2009 WL 62140 *1, *7 (E.D. Cal. Jan. 8, 2009) (stating:"Plaintiff's allegation that C/O Tucker was deliberately indifferent to his serious medical needs when he forcefully removed Plaintiff's doctor issued cane and orthopedic knee brace does not rise to the level of deliberate indifference to a serious medical need. Plaintiff does not allege that C/O Tucker denied, delayed, or intentionally interfered with his medical treatment. Tucker is a correctional officer, not a physician, or medical provider per C.C.R. Title 15, Section 3354. Even in the light most favorable to Plaintiff, an officer's taking of medically indicated apparatuses does not make the officer a medical provider. Plaintiff does not allege that C/O Tucker made any decisions regarding Plaintiff's medical care and/or course(s) of treatment, or interfered with his access to, or delayed his receipt of medical care. Further, Plaintiff fails to show deliberate indifference by C/O Tucker as he states that C/O Tucker took his cane and knee brace because he felt that Plaintiff did not need them. Thus, Plaintiff fails to state a cognizable claim against C/O Tucker for deliberate indifference to Plaintiff's serious medical needs for taking Plaintiff's cane and orthopedic knee brace."), ***Tannenbaum v. Arizona***, 2008 WL 2789589 *1, *9 (D. Ariz. July 17, 2008) (finding no deliberate indifference to serious medical needs where correctional officers took metal knee braces from plaintiff and ordered replacements which did not arrive for a month).

Further, based on the undisputed material facts, there is no remaining issue of material fact regarding the deliberate indifference claim. Pursuant to the February 24, 2010 Order of this Court, the Defendants' First Set of Requests for Admissions to the plaintiff were deemed admitted. (*See* [Doc. 81-1]). The plaintiff admits while he was incarcerated in the subject facility, a medical doctor did not prescribe leg and/or knee braces. (UMF 22). Further, it is admitted that plaintiff could walk without knee braces and special shoes. (UMF 24-25). Additionally, plaintiff was informed by staff that he could purchase tennis shoes from the commissary. (UMF 23).

2. Subjectively Officer McCray Did Not Act With a Sufficiently Culpable State of Mind

Additionally, plaintiff cannot prove the second element of the claim that Officer McCray acted with a "sufficiently culpable state of mind." ***Wilson***, 501 U.S. 294. In fact, Officer McCray explained to plaintiff in response to an inmate request dated April 20, 2007, that the knee braces were not approved and needed to be, approved by Lieutenant Elder. ([Doc. 81-16]). He also informed the plaintiff that tennis shoes could be purchased from the commissary. (UMF 23; McCray Aff. [Doc. 81-13]). That statement does not show a culpable state of mind.

A prison official "must *both* be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." ***Farmer***, 511 U.S. at 835 (1994). In this case, it is undisputed that the plaintiff could walk without the leg braces and special shoes. (UMF 24-25). Further, Sergeant McCray explained to the plaintiff that he should seek approval from Lieutenant Elder if he wanted to use the knee braces. ([Doc. 81-16]). There is no evidence whatsoever that Sergeant McCray was aware of a substantial risk of a serious harm. In fact, there simply was no substantial risk of serious harm. The plaintiff had gone several months without the braces prior to his incarceration and was able to otherwise ambulate in the prison without the braces. Therefore, the plaintiff has failed to prove his claim that Officer McCray or any defendant acted with deliberate indifference to a serious medical need of the plaintiff and, therefore, the plaintiff's Eighth Amendment claim of cruel and unusual punishment must fail.

D. Plaintiff’s Claims for Lack of Clothing Bedding and Medical Treatment

It is admitted that plaintiff was not subjected to lack of clothing, bedding, or medical treatment following the incident. (UMF 11-14). Plaintiff’s admissions resolve his claims that he was subjected to a lack of clothing and medical treatment after the incident. Thus, these previously disputed facts are no longer in dispute and do not constitute any violation by the defendants. The conditions in which the plaintiff was held following the incident did not amount to any constitutional violation.

E. Plaintiff’s Claims Against George Trent

The plaintiff's only claim against George Trent is that "Gladysz was being verbally threatened by defendant Trent”, when the plaintiff allegedly informed Trent of plaintiff's allegations of being subjected to a game in the recreation yard after being sprayed with mace, and being held without clean clothes and bedding, and not being given medical treatment. Plaintiff states that Trent threatened Gladysz by stating "keep your mouth shut or things are going to get a hell of a lot worse." However, George Trent denies these allegations. (*See* Trent Aff. [Doc. 81-17]).

The plaintiff has characterized the actions of George Trent as threatening. Threats do not rise to a constitutional violation pursuant to 42 U.S.C. § 1983. *See* ***Pierce v. King***, 918 F. Supp. 932 (E.D. N.C. 1996) aff'd 131 F.3d 136 (4th Cir. 1997) *vacated on other grounds,* 525 U.S . 802 (1998). Words, no matter how reprehensible, do not rise to the level of depriving an inmate of a constitutional right. *See* ***Mabon v. Campbell***, 205 F.3d 1340 (6th Cir. 2000) Even the most abusive verbal attacks do not violate the constitution. ***Oltarzewski v. Reggiero***, 830 F.2d 136, 139 (9th Cir. 1987); ***Collins v. Cundy***, 603 F.2d 825, 827 (10th Cir. 1979). Therefore, Gladysz's allegations that he was threatened by George Trent do not amount to a constitutional violation and George Trent is entitled to summary judgment in this matter.

The plaintiff also cannot pursue a claim against George Trent in his supervisory capacity. It is well settled that under 42 USC § 1983 liability cannot be based on respondent superior. ***Miltier v. Beorn***, 896 F.2d 848, 854-55 (4th Cir. 1990). Liability cannot be predicated solely upon respondent superior. ***Monell v. Department of Social Services***, 436 U.S. 658 (1978); ***Vinnedge v. Gibbs***, 550 F.2d 926, 928 (4th Cir. 1977). Further, the plaintiff has made no claim of supervisory indifference or tactical authorization of subordinate misconduct that is the direct cause of a constitutional injury. ***Id.*** Plaintiff's only claim is that Trent made a threat to the plaintiff. While the Court may have a duty to liberally construe a plaintiff's complaint, this is not the equivalent of a duty to rewrite the complaint for the plaintiff. ***Snow v. Direct TV Inc.***, 450 F.3d 1314, 1320 (11th Cir 2006); *see also* ***Peterson v. Atlanta Hous. Auth.***, 998 F.2d 904, 912 (11th Cir. 1993).

While a Court may act generously in interpreting a plaintiff's complaint, "generosity is not fantasy." ***Bender v. Suburban Hosp., Inc.***, 159 F.3d 186, 192 (2002). The plaintiff must specify the acts taken by each defendant which would violate his constitutional rights. *See* ***Wright v. Smith***, 21 F.3d 496, 501 (2d Cir. 1994). There must be an allegation of some causal connection. ***Id.*** The plaintiff has not alleged any action on the part of George Trent that led to a constitutional violation. The plaintiff's only claim is that George Trent made a threat to the plaintiff. George Trent must, therefore, be dismissed from this civil action.

E. Defendants Are Entitled to Qualified Immunity

Qualified immunity shields government officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982) (internal quotations omitted). Whether a defendant can claim qualified immunity is a pure question of law and is properly determined pretrial. ***Saucier v. Katz***, 533 U.S. 194, 200-201 (2001), *overruled on other grounds* by ***Pearson v. Callahan***, 129 S.Ct. 808, — U.S.— (Jan. 21, 2009); ***Pritchett v. Alford***, 973 F.2d 307, 313 (4th Cir. 1992). The Supreme Court has noted the need to determine the question of immunity before trial, emphasizing that "immunity is an entitlement not to stand trial" rather than a defense from liability. ***Katz***, 533 U.S. at 200-201 (2001). "Qualified immunity in civil rights actions under § 1983 is an entitlement not to stand trial or face other burdens of litigation, and the determination as to whether a public officer acted with objective reasonableness is a question of law for the court, accordingly, determination of qualified immunity may be made upon a Motion for Summary Judgment and should be made as early as possible ... ". ***Green v. City of Welch***, 822 F. Supp. 1236 (S.D. W. Va. 1993).

The test for qualified immunity was announced by the Supreme Court in ***Harlow***, 457 U.S. at 818:

> Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

The qualified immunity test is one of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith. ***Harlow***, 457 U.S. at 818-19. Courts look to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred. ***Id.*** *See also*, ***Swint v. City of Wadley, Ala.***, 51 F.3d 988, 995 (11th Cir. 1995). "Thus, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" ***Id.*** Furthermore, the contours of a right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. ***Id.***

1. The April 1, 2007 Incident

Here, the defendants are entitled to qualified immunity which defeats plaintiff's asserted claims. Specifically, plaintiff's claims are unfounded after more than a year of discovery. The plaintiff simply has no evidence whatsoever that any conduct on the part of these defendants violated the plaintiff's constitutional rights. The material issues of fact have been resolved: the plaintiff caused a disturbance by throwing soap and that he struggled with officers (UMF 1, 3-4); there was no wanton infliction of pain as alleged by plaintiff; further, plaintiff was provided the necessary and adequate medical care. (UMF 7-15). Accordingly, defendants are entitled to qualified immunity as to plaintiff's claims regarding the incident involving the O.C. spray.

2. Plaintiff's Leg and Knee Braces

Additionally, Officer McCray is entitled to qualified immunity as to his failure to provide plaintiff with his leg and knee braces. It is well settled that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow***, 457 U.S. at 818; ***Prichett***, 973 F.2d at 312.

In this case, the plaintiff, who could walk without the braces, was not provided the braces by Officer McCray because he did not have any information that the plaintiff was allowed to have these braces in the general population. (UMF 22; McCray Aff. [Doc. 81-16]). Officer McCray had no information the knee braces were approved or needed by the plaintiff. (Id.) Plaintiff admits that no doctor from the medical facility had prescribed the braces. (UMF 22). Plaintiff admits that he can walk without the knee braces and special shoes. (UMF 24-25). The evidence, therefore, indicates that the officers' actions related to the claims pertaining to the knee braces were not violative of statutory or constitutional rights which a reasonable person would have known. ***Harlow***, 457 U.S. at 818; ***Prichett***, 973 F.2d at 312.

Defendants are, therefore, entitled to qualified immunity regarding the plaintiff's claims that he was subjected to cruel and unusual punishment because his requested leg braces were not immediately provided to him.

Accordingly, this Court is of the opinion that Defendants' Second Motion for Summary Judgment [Doc. 80] should be, and the same is, hereby **GRANTED**. Accordingly, this Court hereby **ORDERS** that the above-styled case be **DISMISSED** from the active docket of this Court.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

It is so **ORDERED**.

DATED: December 20, 2010

JOHN PRESTON BAILEY
CHIEF UNITED STATES DISTRICT JUDGE